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No. 84-974

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IN THE

Supreme Court of the United States

October Term, 1984

JACK R. BATTIPAGLIA and BACCHUS SELECTIONS, INC.,
Petitioners,

vs.

NEW YORK STATE LIQUOR AUTHORITY and
PEERLESS IMPORTERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT NEW YORK STATE LIQUOR AUTHORITY IN OPPOSITION

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Question Presented

Whether the Court of Appeals correctly held that New York Alcoholic Beverage Control Law § 101-b does not offend the Supremacy Clause of the United States Constitution and the Sherman Act, § 1, because it is a valid exercise of state authority under the Twenty-First Amendment and does not mandate conduct violative of federal antitrust laws.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of the Case	2
Summary of Argument	6
Argument	
The petitioners have failed to meet any criterion which would warrant the granting of the petition	7
A. The majority opinion below is consistent with cases decided by other courts, including the New York Court of Appeals, on identical issues	7
B. The legal analyses by the Court of Appeals correctly reflects recent decisions by this Court which have settled the issues presented here	8
Conclusion	12
Appendices	
A—New York State Alcoholic Beverage Control Law § 101-b (McKinney 1970, as amended) provides, in pertinent part	1a
B—The following is the opinion of the New York Court of Appeals in *Admiral Wine & Liquor Corp.* v. *State Liquor Authority*, 61 NY2d 858 (1984)	3a

TABLE OF AUTHORITIES

PAGE

Cases:

Admiral Wine & Liquor v. State Liquor Authority, 61 NY2d 858 (1984) 4, 7, 9

Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984) 11

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 3, 5, 9, 10

Capital Cities Cable, Inc. v. Chrisp, 104 S. Ct. 1267 (1984) 11

Enrico's Inc. v. Rice, 551 F. Supp. 511 (N.D. Cal. 1982), *vacated as moot,* 730 F.2d 1250 (9th Cir. 1984) 5, 7, 10

Hoover v. Ronwin, 104 S. Ct. 1989 (1984) 10

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 11

Intercontinental Packaging Co. v. Novak, 384 N.W.2d 330 (Minn. 1984) 7

Joseph E. Seagram & Sons, Inc v. Hostetter, 384 U.S. 35 (1966) 9, 11

Miller v. Hedlund, 579 F. Supp. 116 (D. Ore. 1984), *appeal docketed,* No. 84-3749 (9th Cir. 1984) 5, 7

Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981), *aff'g Serlin Wine & Spirit Merchants Inc.* v. *Healy,* 512 F. Supp. 936 (D. Conn. 1981) 9

Parker v. Brown, 317 U.S. 341 (1943) 4

Rice v. Norman Williams, 458 U.S. 654 (1982) 5, 8

PAGE

United States Brewers Assn., Inc. v. Healy, 532 F. Supp. 1312 (D. Conn. 1981), *rev'd on other grounds,* 692 F.2d 275 (2d Cir. 1982), *aff'd,* 104 S. Ct. 265 (1983) 5, 7, 9

United States v. Citizens and Southern National Bank, 422 U.S. 86 (1975) 9

Wine & Spirits Speciality, Inc. v. Daniel, 666 S.W.2d 416 (Mo.), *appeal dismissed,* 105 S. Ct. 56 (1984) 7

Constitutional Provisions:

The Twenty-First Amendment to the United States Constitution 2

Statutes:

Robinson-Patman Act, 15 U.S.C. § 13 11
New York Alcoholic Beverage Control Law § 101-b ..*passim*

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Opinions Below

The opinion of the Second Circuit Court of Appeals is reported at 795 F.2d 166 and is reproduced as exhibit "A" to the Appendix to the Petition. The opinion of the District Court (OWEN, J., S.D.N.Y.) and the judgment of that court are not reported but are annexed to the Petition as exhibits "B" and "C" to the Appendix.

Jurisdiction

The petitioners rely on 28 U.S.C. § 1254(1) in support of the jurisdiction of this Court.

Constitutional and Statutory Provisions

The Constitutional and statutory provisions indicated below are at issue.

The *Twenty-First Amendment* to the United States Constitution, which reads, in part:

> Sec. 2. The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The *Sherman Act*, § 1, 15 U.S.C. § 1, provides:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

New York Alcoholic Beverage Control Law § 101-b (McKinney 1970, as amended), relevant portions of which are annexed hereto as Exhibit "A" to the Appendix.

Statement of the Case

This action, commenced in 1980 by a New York licensed liquor wholesaler and a retailer, sought a declaratory judgment holding New York Alcoholic Beverage Control Law § 101-b ("ABC Law") in violation of the Sherman Act, § 1,

15 U.S.C. § 1, and invalid under the Supremacy Clause of the United States Constitution, Art. VI. Petitioners have based their facial attack on the statute upon the assertion that the provisions of ABC Law § 101-b authorize illegal antitrust arrangements and are identical to the California statutory provisions struck down by this Court in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

ABC Law § 101-b(1) expresses a strong state public policy aimed at eliminating the undue stimulation of sales of alcoholic beverages and the granting of discounts, rebates, allowances, free goods and other inducements "which contribute to a disorderly distribution of alcoholic beverages." ABC Law § 101-b(2) makes it unlawful for any person selling liquor or wine to discriminate in price to his customers except for small quantity or early payment discounts set by statute.

In order to implement this regulatory scheme, ABC Law § 101-b(3)(b) provides that no brand of liquor or wine shall be sold unless the seller (wholesaler) shall have filed with the State Liquor Authority ("SLA") a schedule of his own prices to his customers. ABC Law § 101-b(4) provides that the schedules must be filed before the fifth day of each month, with the prices to be effective for the following calendar month. Within ten days after a schedule is filed, the SLA makes the schedule available for public inspection. Within three days after the date provided for public inspection a wholesaler may amend his schedule to meet competition by lowering his price on one or more items; however, he may not thereby raise any price contained in the original schedule as filed. The wholesaler may not deviate from the

"posted" schedules except upon prior written permission of the SLA.

The regulatory scheme of ABC Law § 101-b makes no provision for retail price maintenance or so-called fair trade agreements. Nor does it make any provision which requires or authorizes one wholesaler to be bound to any price schedule filed by another.

On September 27, 1982, the District Court (OWEN, J.), in denying plaintiffs' motion for summary judgment, concluded that the statutory scheme of ABC Law § 101-b was not violative of the Sherman Act, § 1. The District Court further concluded that, in any event, the statute was protected under the "state action" doctrine enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943). Although the issue was raised, the District Court found it unnecessary to decide whether the statute was otherwise protected under the Twenty-First Amendment to the United States Constitution. On February 2, 1984, the District Court granted summary judgment to the defendants, based upon the reasoning of its earlier decision. The plaintiffs appealed to the Court of Appeals for the Second Circuit.

On February 23, 1984, the New York court of last resort, the State Court of Appeals, upheld ABC Law § 101-b on an identical constitutional and antitrust challenge in *Admiral Wine & Liquor* v. *State Liquor Authority*, 61 NY2d 858 (1984), a case in which the petitioners here appeared as *amicus curiae*.

On September 21, 1984, the Second Circuit affirmed the order of the District Court. In the majority opinion

(FRIENDLY, VAN GRAAFEILAND, JJ.), the court in applying *Rice* v. *Norman Williams*, 458 U.S. 654 (1982), concluded that ABC Law § 101-b does not on its face compel any agreement in restraint of trade as prohibited by § 1 of the Sherman Act (Pet. at 1a-25a). The court noted that the schedules required to be filed by the wholesalers are their "individual acts." The majority opinion in upholding the statute noted that in an earlier case, *United States Brewers Assn., Inc.* v. *Healy*, 532 F. Supp. 1312 (D. Conn. 1981), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 104 S. Ct. 265 (1983), a similar challenge to Connecticut's price posting law was also rejected. The court also took note of the decisions in *Enrico's, Inc.* v. *Rice*, 551 F. Supp. 511 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984), and *Miller* v. *Hedlund*, 579 F. Supp. 116 (D. Ore. 1984), which upheld similar statutes.

The Second Circuit, as did the District Court, distinguished the holding in *Midcal*, noting that that case involved fair trade contracts which are *per se* violative of the Sherman Act § 1, and an alternative price posting system, entirely different from New York's, in which a California wholesaler, in the absence of a distiller's fair trade agreement, could file a price schedule binding upon all wholesalers in his district. While the Second Circuit neither approved nor disapproved of the District Court's holding that the statute is protected under the "state action" doctrine, it went on to hold that, in any event, ABC Law § 101-b is insulated from attack here under the Twenty-First Amendment.

The dissenting opinion (WINTER, J.) concluded that the legislative scheme limiting price competition with respect

to published prices would constitute a *per se* violation of the federal antitrust laws but for the fact that the state "compels" such conduct. The dissent stated that ABC Law § 101-b fails to meet the second element of the two-pronged *Midcal* state action test because the state's policy of compelling such arrangements was not "actively supervised" by the state itself. Significantly, however, the dissent made no reference to the very recent decision of this Court in *Hoover* v. *Ronwin,* 104 S. Ct. 1989 (1984), which held that the two-pronged *Midcal* test does not apply where the alleged restraint is effectuated by legislative mandate. The dissenting opinion also concluded that the statute should not be protected under the Twenty-First Amendment.

Summary of Argument

The petitioners have failed to present any basis upon which this Court in the exercise of its discretion should grant the petition. The majority opinion below, upholding the facial constitutionality of ABC Law § 101-b as not in conflict with federal antitrust laws, is not in conflict with the decision of another federal court of appeals on the same matter. Moreover, the holding is entirely in conformity with the recent holding of New York's highest court, which upheld the identical provision from an identical attack.

The majority opinion below correctly analyzes and applies recent decisions of this Court and is in conformity with a number of analogous cases across the country. As this case presents no important federal question which has not already been passed upon by this Court, the petition should be denied.

ARGUMENT

The petitioners have failed to meet any criterion which would warrant the granting of the petition.

A. The majority opinion below is consistent with cases decided by other courts, including the New York Court of Appeals, on identical issues.

In upholding ABC Law § 101-b, which on its face merely requires a wine and liquor wholesaler to file a schedule of its own prices and which does not authorize or mandate concerted activity violative of § 1 of the Sherman Act, the court below was consistent with decisions across the country in similar cases. *E.g.*: *United States Brewers Ass'n., Inc.* v. *Healy*, 532 F. Supp. 1312 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 104 S. Ct. 265 (1983); *Enrico's, Inc.* v. *Rice*, 551 F. Supp. 511 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *Miller* v. *Hedlund*, 579 F. Supp. 116 (D. Ore. 1984), *appeal docketed*, No. 84-3749 (9th Cir. April 12, 1984); *Wine & Spirits Speciality, Inc.* v. *Daniel*, 666 S.W.2d 416 (Mo.), *appeal dismissed*, 105 S. Ct. 56 (1984); *Intercontinental Packaging Co.* v. *Novak*, 384 N.W.2d 330 (Minn. 1984). Research by us fails to disclose any United States Court of Appeals decision inconsistent with or contrary to the holding below.

The decision of the court below is entirely in conformity with and mirrors the recent decision of the New York Court of Appeals, upholding the identical statute under an identical constitutional and antitrust attack in a case in which the petitioners here appeared as *amicus curiae*. A copy of the decision in that case, *Admiral Wine & Liquor* v. *State*

Liquor Authority, 61 NY2d 858 (1984), is annexed hereto as exhibit "B" to the Appendix.

B. The legal analyses by the Court of Appeals correctly reflects recent decisions by this Court which have settled the issues presented here.

The majority below correctly held that a state law challenged under the Supremecy Clause as violative of federal antitrust policy should not be struck down unless on its face the law mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases. This analysis flows from the recent holding in *Rice* v. *Norman Williams,* 458 U.S. 654 (1982), where this Court upheld, against similar constitutional and antitrust attack, a California law requiring that licensed importers of alcoholic beverages could purchase such products from a distiller only if they were designated as authorized importers or agents of the particular distiller.

In upholding that law, this Court said in Norman Williams, 458 U.S. at 661:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

ABC Law § 101-b merely provides a statutory mechanism under which each wine wholesaler must file a schedule

of *its own* prices with the SLA, which prices are then "frozen" for a month by operation of statute, subject to modification upon written approval of the SLA. The statute neither mandates nor authorizes any concerted conduct such as would constitute a *per se* violation of the Sherman Act. This is precisely what the Court of Appeals and the *Admiral* court found. These decisions that unilateral price posting or the exchange of price information do not in and of themselves constitute a violation of the Sherman Act are solidly based upon holdings of this Court. *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86 (1975); *see also, Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45 (1966) (in referring to price posting under ABC Law § 101-b: "[t]he bare compilation, without more, of price information on sales to wholesalers and retailers * * * would not of itself violate the Sherman Act").

The petitioners' and the dissenting opinion's reliance upon the holding in *Midcal* is misplaced. As the majority noted, the statute in the *Midcal* case mandated resale price maintenance by enforcing fair trade agreements among wine producers and wholesalers. Such agreements have long been regarded as *per se* violations of the Sherman Act. The distinction found by the Second Circuit here between mere price posting, such as found in this case, and resale price maintenance, such as found in *Midcal*, is observed in other similar cases. *E.g.*: *Morgan* v. *Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981), *aff'g, Serlin Wine & Spirit Merchants Inc.* v. *Healy*, 512 F. Supp. 936 (D. Conn. 1981); *United States Brewers Ass'n, Inc.* v. *Healy*, 532 F. Supp. at 1329-30; *Admiral Wine & Liquor* v.

State Liquor Authority, 61 NY2d at 860; *Enrico's, Inc.* v. *Rice,* 551 F. Supp. at 514.

The dissent erred in concluding that adherence by wholesalers to their own prices posted under ABC Law § 101-b would constitute a *per se* violation of the Sherman Act but for the fact that the conduct is compelled by the state rather than effectuated by any voluntary conspiracy. On the contrary, the adherence to one's own prices is unilateral conduct and such conduct does not fall within the prohibitions of § 1 of the Sherman Act.

Further, even assuming, *arguendo,* such conduct constituted a *per se* violation, the dissenting opinion erred in concluding that the compelling antitrust activity is only exempt under the two-pronged "state action" test referred to in *Midcal* (i.e., clearly articulated and affirmatively expressed state policy and active supervision of the conduct by the state itself). 445 U.S. at 105. In the recent decision in *Hoover* v. *Ronwin,* 104 S. Ct. 1989, 1995-1996 (1984), this Court, in placing such cases as *Midcal* in perspective, emphasized that a restraint imposed by the sovereign directly is *per se* state action and exempt from the antitrust laws. This Court stated in *Hoover,* 104 S. Ct. at 1995:

> When the conduct at issue is in fact that of the state legislature * * * we need not address the issues of "clear articulation" and "active supervision."

In the instant case, the statutory requirement that prices be posted and that they be followed without deviation for a set period of time is certainly direct state action.

Finally, with respect to the application of the Twenty-First Amendment, the majority below, in applying such

recent decisions of this Court as *Capital Cities Cable, Inc.* v. *Chrisp,* 104 S. Ct. 1267, (1984), and *Bacchus Imports, Ltd.* v. *Dias,* 104 S. Ct. 3049, (1984), as well as *Joseph E. Seagram & Sons* v. *Hostetter,* 384 U.S. 35 (1966), correctly concluded that even if ABC § 101-b were in conflict with federal antitrust policy—which the majority found it was not—the compelling state interest here in deterring price discrimination in the liquor industry should prevail under the Twenty-First Amendment.

The majority below correctly rejected the argument made here by petitioners that the State's interest under ABC Law § 101-b should be struck down for the same reasons this Court struck down the California price maintenance law in *Midcal.* The majority accurately observed that the *Midcal* case did not involve a strong state policy against price discrimination as here. The majority further observed that the resale price maintenance involved in *Midcal* constituted a *per se* violation of, and was therefore in direct conflict with, federal antitrust law; price posting under ABC Law § 101-b, however, not only does not conflict with federal policy, but actually reflects it. 15 U.S.C. § 13 (Robinson-Patman Act). The holding of the majority is entirely in conformity with this Court's holding that courts should not " '[s]eek out conflicts between state and federal regulation where none clearly exists.' " *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45 (1966) (*quoting Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 446 [1960]).

Conclusion

The petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
February 8, 1985

Respectfully submitted,

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APPENDICES

APPENDIX A

New York State Alcoholic Beverage Control Law § 101-b (McKinney 1970, as amended) provides, in pertinent part.

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund

1. It is the declared policy of the state that is is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for an obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

* * *

3(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to re-

tailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers. Where any schedule filed after the effective date hereof pursuant to paragraph (a) of this subdivision with respect to any brand of liquor reflects a reduction or increase in the bottle or case price of any item set forth therein from the bottle or case price of such item theretofore in effect for the previous month, for the period during which the bottle and case price of any item set forth therein shall remain in effect, any schedule of prices to retailers filed by a wholesaler pursuant to this paragraph with respect to such item of liquor shall reflect, in the event of a decrease, a like reduction in percentum in the bottle or case price of such item set forth therein, and in the event of an increase, not more than a like increase in percentum in the bottle or case price of such item set forth therein. Nothing herein contained however, shall prohibit changes in prices to retailers by a wholesaler for any item of liquor which changes are based on increased costs of labor or other operating costs, on the written permission of the authority, for good cause shown and for reasons not inconsistent with the purpose of this chapter, except that the case and bottle price from wholesaler to retailer may be decreased or increased without such permission to reflect any changes in or new taxes or fees applicable to liquor with the same effect as if such decrease or increase in taxes or fees were set forth in the schedule of prices filed pursuant to paragraph (a) hereof.

APPENDIX B

The following is the opinion of the New York Court of Appeals in *Admiral Wine & Liquor Corp.* v. *State Liquor Authority*, 61 NY2d 858 (1984).

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be modified, with costs, by reinstating the State Liquor Authority's findings with respect to charge No. 2 and otherwise affirmed. The certified question should be answered in the negative.

Subdivision 3 of section 101-b of the Alcoholic Beverage Control Law does not violate the Sherman Antitrust Act (Battipaglia v. New York State Liq. Auth., 583 F. Supp. 8). The Appellate Division's reliance on Matter of Mezzetti Assoc. v. State Liq. Auth. (51 NY2d 761) and California Liq. Dealers v. Midcal Aluminum (445 U.S. 97) is misplaced because the statutes found to be invalid in those cases established a price maintenance scheme. Subdivision 3 of section 101-b, on the other hand, is a price-posting statute, which simply requires the dealer to file with the State, on a monthly basis, a list of the prices the dealer himself has decided to charge for his products during that period with provisions for a downward modification of that price. Subdivision 3 of section 101-b does not authorize anyone to determine retail prices for wine, nor does it bind other wholesalers as to the prices which they may charge their dealers.

Having concluded that there is no irreconcilable conflict between the State statute and the Sherman Act, we also find no merit to appellant's argument that the State law is invalid because it might have an anticompetitive effect (Rice v. Williams Co., 458 U.S. 654, 659).

We also note that the authority does not contest the Appellate Division's annulment of its findings with respect to count No. 3 and thus we do not reach or decide the question. The authority, however, should now reconsider the penalty in light of the dismissal of charge No. 3.

Judges JASEN, JONES, WACHTLER, MEYER and KAYE concur; Chief Judge COOKE and Judge SIMONS taking no part.

Order modified, with costs to the State Liquor Authority, in accordance with the memorandum herein and, as so modified, affirmed. Question certified answered in the negative.